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November 30, 1999

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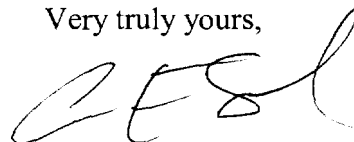
Re: Comments Filed by Excell Agent Services on November 29, 1999

Dear Ms. Salas,

Please find enclosed Exhibit A and Exhibit B to the comments filed by Excell Agent Services, LLC on November 29, 1999 to the forbearance petitions filed by Bell Atlantic, BellSouth and SBC in Common Carrier Docket No. 97-172.

If you have any questions regarding this submission, please contact the undersigned.

Very truly yours,



Cara E. Sheppard

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
)

Petition of Bell Atlantic)
for Forbearance from)
Section 272 Requirements in Connection with)
National Directory Assistance Services)
_____)

CC Docket No. 97-172

COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

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November 12, 1999

WASHINGTON, D.C. 20554

CC Docket No. 97-172

Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service, CC Docket No. 97-172 (Oct. 22, 1999) ("Petition").

services.² In line with the US WEST NDA Order, Bell Atlantic's provision of non-local DA service, albeit an interLATA service, is permitted under section 271(g)(4), the exception for incidental interLATA services. If the FCC permits Bell Atlantic to opt into the US WEST NDA Order, the FCC will forbear from applying the separate subsidiary requirements of section 272 to Bell Atlantic but retain the nondiscrimination requirements it retained in US WEST NDA Order pursuant to section 272(c)(1).³ Under these nondiscrimination provisions, an RBOC must: (1) make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide DA service at the same rates, terms, and conditions it imputes to itself; (2) make changes to its cost allocation manual to reflect this change accordingly; (3) make the directory listing information of the customers of independent and competitive local exchange carriers ("LECs") operating in its region available to unaffiliated entities if the RBOC uses the same information in its provision of non-local DA service; and (4) update and maintain the directory listing information it provides to unaffiliated entities in the same manner it updates and maintains the directory listing information it uses in the provision of non-local DA service.⁴ Bell Atlantic concedes in its Petition that it will comply with all of these non-discrimination requirements.⁵

² See Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Memorandum Opinion and Order, CC Docket Nos. 97-172 and 92-105 (rel. Sept. 27, 1999) ("US WEST NDA Order").

³ Id.

⁴ Id., para. 37.

⁵ See Petition, at 4.

In these comments, Excell urges the FCC to recognize the fact that the RBOCs can manipulate the non-discrimination requirements established in the US WEST NDA Order to charge anti-competitive rates for DA data to unaffiliated entities. The non-discrimination requirements in their current form have not curbed US WEST's practice of assessing unjust and unreasonable rates for directory assistance data to unaffiliated entities. As the FCC explained in the US WEST NDA Order, "because of [the RBOCs'] dominance in the local market, [they have] the ability to charge rates for directory listing information that may make it difficult for competing providers of non-local directory assistance service to succeed in the market and at the same time, give [the RBOCs] a competitive advantage."⁶ It was for this reason that the FCC retained certain non-discrimination requirements from section 272 in the US WEST NDA Order. However, since the requirements as currently written have not deterred the RBOCs from treating unaffiliated providers of DA in a discriminatory fashion, the FCC should determine that if the FCC finds that LECs must provide DA data at cost-based rates in the DA Access Proceeding,⁷ it should apply that safeguard to the RBOCs in this proceeding (on a retroactive basis if necessary). In addition, if the FCC develops any other pro-competitive safeguards in the DA Access Proceeding, it should similarly apply those safeguards to any RBOCs which may obtain forbearance relief.

⁶ US WEST NDA Order, para 53.

⁷ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Provision of Directory Listing Information Under the Communications Act of 1934, As Amended, Third Report and Order; Second Order on Reconsideration of the Second Report and Order; Notice of Proposed Rulemaking, 16 CR 3019 (1999) ("DA Access Proceeding").

Additionally, the FCC should also determine, as it did in a recent order addressing a complaint by MCI Telecommunications Corporation (MCI) against US WEST and Ameritech,⁸ that Bell Atlantic was in violation of section 271 of the Act the entire time it provided the nationwide component of its DA service using facilities owned by VoltDelta. Finally, the FCC should determine that the 3 year sunset deadline set in section 271(f)(1) should have no bearing on the non-discrimination requirements set forth in the US WEST NDA Order. If the Commission does set a sunset date for the non-discrimination requirements established in the US WEST NDA Order, the Commission should set that sunset at a minimum of 7 years from the date any RBOC may be granted forbearance relief.

II. THE FCC SHOULD RECOGNIZE THE RBOCs' ABILITY TO MANIPULATE THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED IN THE US WEST NDA ORDER AND APPLY ANY PRO-COMPETITIVE SAFEGUARDS IT DEVELOPS IN THE DA ACCESS PROCEEDING TO THE RBOCs IN THE INSTANT PROCEEDING ON A RETROACTIVE BASIS

In its forbearance proceeding, US WEST sought relief from section 272 which would have required it to provide non-local DA services through a separate affiliate. The FCC determined that it would refrain from applying section 272 in its entirety, but would retain the non-discrimination requirements under section 272(c)(1) in connection with US WEST's provision of non-local DA services. Section 272(c)(1) provides that a BOC "may not discriminate between [its section 272 affiliate] and any other entity in the provision or

⁸ MCI Telecommunications Corp. v. US WEST Communications, Inc., et al. Memorandum Opinion and Order, File Nos. E-97-40 and E-97-19, DA 99-2479, para. 17 (rel. Nov. 8, 1999) ("MCI Order").

procurement of goods, services, facilities and information.”⁹ To guard against such unlawful discrimination, the FCC determined that US WEST must “make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide directory assistance service at the same rates, terms and conditions it imputes to itself.”¹⁰

The FCC made this determination based upon its finding in the record that “the rates US WEST charges unaffiliated entities for obtaining directory listing information have the potential to adversely affect competition in the non-local directory assistance market.”¹¹ Excell believes that the FCC was concerned with the record before it which demonstrated the exorbitant rates the RBOCs charge for access to directory assistance data and prescribed a remedy it thought would bring those rates to a competitively reasonable level. However, instead of respecting the non-discrimination requirement imposed on US WEST in the US WEST NDA Order as an admonition against RBOC anti-competitive practices, the RBOCs have treated the non-discrimination requirements as a loophole to enable them to continue to charge unreasonable rates to unaffiliated entities. In effect, under the non-discrimination requirement, the RBOCs are able to charge any rate, no matter how unreasonable, to unaffiliated entities as long as they “impute” those same rates to themselves. Certainly, US WEST was required to “record any charges it imputes for its non-local directory services in its revenue accounts” and to “account for any imputed charges by debiting its non-regulated operating revenue accounts and crediting its

⁹ 47 U.S.C. § 272(c)(1).

¹⁰ US WEST NDA Order, para. 37.

¹¹ US WEST NDA Order, para. 35.

regulated revenue accounts by the amounts of the imputed charges.”¹² However, this is a mere procedural requirement that does not detrimentally affect an RBOC’s ability to compete. On the other hand, the unaffiliated entities that must pay these excessive rates for DA data to the RBOCs do not have the luxury of debiting their non-regulated operating revenue accounts and crediting their regulated revenue accounts. Excell submits that the RBOCs may be able to comply with the FCC’s imputation requirements in every respect, but that such requirements will defeat the FCC’s original purpose in retaining the non-discrimination provisions under section 272 in the US WEST NDA Order: to “ensure that the competitive advantages US WEST enjoys with respect to the provision of directory assistance service throughout its region will not undermine competition in the market for non-local directory assistance.”¹³

In the DA Access Proceeding, several parties suggested that the FCC impose specific regulatory safeguards on the LECs in order to promote competition in the market for directory assistance services. Independent DA providers and the carriers that purchase wholesale DA from these providers filed comments in the DA Access Proceeding demonstrating to the FCC that LECs should be required to permit non-discriminatory access to their DA data at rates based on costs. Thus, Excell submits that the FCC should condition any relief it may grant to Bell Atlantic in this proceeding on the applicability of any pro-competitive safeguards it may adopt in the DA Access Proceeding. Because the FCC may resolve the RBOC forbearance proceedings prior to resolving the DA Access Proceeding, it should determine that any pro-competitive safeguards

¹² Id. para. 37, n.95.

¹³ US WEST NDA Order, para. 36.

developed in the DA Access Proceeding will be retroactively applied to the RBOCs that may be subject to the decisions in these forbearance proceedings (including US WEST).

Indeed, the FCC is authorized pursuant to section 271(h) to apply potential pro-competitive findings in the DA Access Proceeding to the RBOCs that seek or have obtained forbearance. Section 271(h) states that the FCC must "ensure that the provision of services authorized [as incidental interLATA services under section 271(g)] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."¹⁴ Currently, the RBOCs can manipulate the non-discrimination requirements in such a way that allows them to continue to charge excessive and unreasonable rates to their competitors for the provision of directory assistance. This adversely affects the market for DA services and is ultimately injurious to telephone exchange service ratepayers.

III. THE FCC SHOULD CLARIFY THAT THE NON-DISCRIMINATION REQUIREMENTS PROHIBIT AN RBOC FROM DISCRIMINATING BETWEEN "CLASSES" OF UNAFFILIATED ENTITIES

Bell Atlantic's current offer to Excell would require the purchase of a minimum of 60,000,000 listings with a minimum fee of \$1,800,000 for the first year of its contract and a minimum of 30,000,000 listings for each year after the first year of the contract. Conversely, Excell has learned that Bell Atlantic does not routinely require competing providers of telephone exchange service and telephone toll service to purchase a minimum number of listings. Bell Atlantic, in its provision of DA data to unaffiliated entities under the requirements established in

¹⁴ 47 U.S.C. § 271(h).

the US WEST NDA Order, should not be permitted to discriminate in any manner between classes of unaffiliated entities. In its Petition, Bell Atlantic concedes that it will comply with the non-discrimination requirements set forth in the US WEST NDA Order. Thus, the FCC should reaffirm those broad non-discrimination requirements in this proceeding.

IV. THE FCC SHOULD FIND THAT PRIOR TO BELL ATLANTIC'S PURCHASE OF VOLTDELTA'S INFORMATION STORAGE FACILITIES, IT WAS PROVIDING NON-LOCAL DIRECTORY ASSISTANCE DATA IN VIOLATION OF SECTION 271

In the US WEST NDA Order, the FCC construed section 271(g)(4) to permit a BOC to offer non-local directory assistance only when it uses its own information storage facilities.¹⁵ Because Bell Atlantic states in its Petition that it was providing non-local listings outside of New York and New England using storage facilities owned by VoltDelta, the FCC should declare that Bell Atlantic, until it purchased VoltDelta's facilities, violated section 271. The FCC recently determined that "US WEST had been and will be violating section 271 of the Act by providing the nationwide component of its directory assistance services [while it does not own the information storage facility accessed by US WEST to provide these services] from the date it began offering non-local directory assistance service until the date upon which US WEST brings the nationwide component of its service into full compliance with the requirements set forth in the [US WEST NDA Order]."¹⁶ Excell believes that US WEST continues provide nationwide DA services over the facilities of other entities in violation of the FCC's directive in the US WEST NDA Order that "US WEST must cease providing nationwide directory assistance until

¹⁵ See US WEST NDA Order, para. 23; see also MCI Order, para 17.

¹⁶ MCI Order, para. 17.

that service is reconfigured to comply with section 271(g)(4).¹⁷ The FCC should be cognizant of this. Similarly, the FCC should recognize and determine that Bell Atlantic was also in violation of section 271 for providing the nationwide component of its DA service until it purchased storage facilities from VoltDelta.

V. THE SUNSET PROVISIONS IN SECTION 272 DO NOT APPLY TO THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED BY THE FCC IN THE US WEST NDA ORDER AND IN THE ORDER THAT WILL ADDRESS BELL ATLANTIC'S PETITION OR, IN THE ALTERNATIVE, THE SUNSET PROVISIONS SHOULD BE EXTENDED TO 7 YEARS OR BEYOND

Excell is concerned that the provisions of section 272(f)(1) may be interpreted to create a sunset for the non-discrimination requirements the FCC applied to US WEST and will potentially apply to other RBOCs in their provision of non-local DA services pursuant to section 272(c)(1). Section 272(f)(1) states that the "provisions of [section 272] . . . shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order."¹⁸ Excell submits that the FCC has determined that non-local DA service provided by the RBOCs is an incidental interLATA service permitted under the section 271(g)(4) exception, and since the statutory sunset applies to services authorized pursuant to section 271(d) and not incidental interLATA services authorized pursuant to section 271(g)(4), section 272(f)(1) does not apply.

¹⁷ See US WEST NDA Order, para. 63.

¹⁸ 47 U.S.C. § 272(f)(1) (emphasis added).

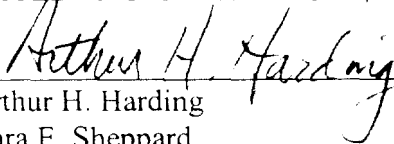
In the alternative, section 272(f)(1) enables the FCC to extend the 3 year period by rule or order, and Excell submits that if the FCC does apply the sunset in section 272(f)(1) to the non-discrimination requirements it established in the US WEST NDA Order, it should change that sunset date to at least 7 years from the date any RBOC may be granted forbearance relief.

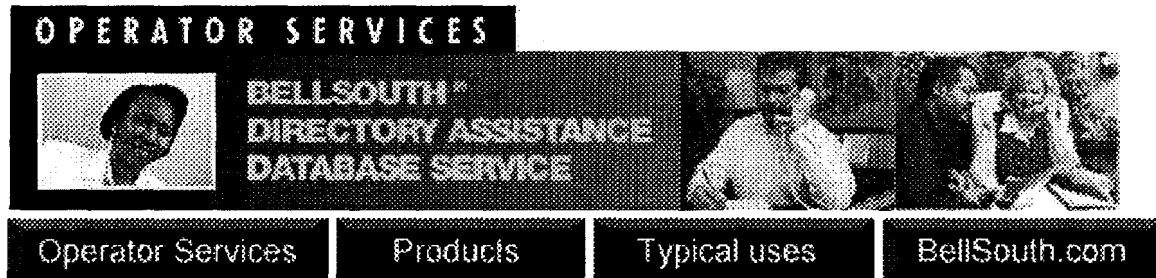
VI. CONCLUSION

For the reasons explained herein, the FCC should grant Bell Atlantic's Petition to opt into the US WEST NDA Order. However, the FCC should also find that any pro-competitive safeguards established in the DA Access Proceeding, including any provision that would require the RBOCs to provide access to DA data at cost-based rates, must be applied to Bell Atlantic and the other RBOCs that seek or have obtained forbearance from section 272 in CC Docket No. 97-172. This finding and the other findings Excell has urged throughout these comments are necessary to prevent the RBOCs from assessing unjust and unreasonable rates for DA data and to promote competition in the market for directory assistance services.

Respectfully submitted,

EXCELL AGENT SERVICES, L.L.C.


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Cara E. Sheppard
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Washington, D.C. 20036
Counsel to Excell Agent Services, L.L.C.



Charges and Billing

Pricing elements

How you are billed

Other charges

Pricing elements

BellSouth Directory Assistance Database Service billing consists of two pricing elements:

1. a monthly administrative fee for the daily update files; and
2. a usage fee every time you access a listing. In addition, a cancellation and/or termination fee may also apply.

How you are billed

You will be billed:


1. a monthly administrative fee for daily updated files. The monthly administrative fee applies for one year subject to a termination fee.
2. a usage fee. This fee is calculated based on usage information you report. You are required to furnish usage information no later than the 10th calendar day of each month. If you don't report usage by the 10th calendar day of each month, BellSouth will bill a maximum usage fee as it determines.


Other charges

You may be charged:

1. a cancellation fee if you cancel an order for the base file prior to scheduled delivery. This charge will recover the cost incurred by BellSouth for the work performed prior to cancellation.
2. a termination fee if you cancel your order on or after the scheduled delivery date for the base file. The termination fee is determined by multiplying the number of months remaining in the 12-month period by the monthly administrative fee.

OPERATOR SERVICES

**BELLSOUTH[®]
DIRECTORY ASSISTANCE
DATABASE SERVICE**



Operator Services

Products

Typical uses

BellSouth.com

Ordering and Using

How to order

Minimum time period

Base files and updates

Restrictions on use

Other requirements

How to order

1. Determine the area in which you wish to provide Directory Assistance service.
2. Identify the BellSouth central offices serving the area.
3. Develop a written plan detailing how you will track the data used in the your system.
4. Fill out our online application.

Minimum time period

The minimum time period for ordering the service is 12 months. If you discontinue your service before that time, you will be charged a termination fee.

Base files and updates

When you begin using BellSouth Directory Assistance Database Service, we will provide you with a base file containing all of the necessary data for each central office and the daily updates for you to keep your file current.

The base file and daily update files will be on magnetic or cartridge tape (see "Record Layout Information").

Restrictions on use

Use of BellSouth Directory Assistance Database Service is subject to several restrictions. You may not do any of the following:

- Disclose the data to others except for permitted uses;
- Compromise the security and confidentiality of the data.
- Reproduce (except for archiving copies), rent, license, or resell Directory Assistance Database Service for any purpose.
- Use Directory Assistance Database Service in any way that violates federal or state laws, statutes, regulatory orders or tariffs.

If you fail to comply with the service provisions for Directory Assistance Database Service, BellSouth will terminate the service, and you will immediately return all copies of Directory Assistance Database Service or provide adequate written proof that all copies have been removed from your system and properly destroyed. BellSouth may also terminate Directory Assistance Database Service at any time when it has reasonable grounds to believe that you are violating these service provisions.

Other requirements

You are required to provide BellSouth a monthly itemized statement of Directory Assistance Database Service usage indicating the date, time of the call, the telephone number accessed, the central office (NPA-NXX) and the total number of times the listings were accessed (see sample format). *This Usage Report is due to BellSouth by the 10th of each month for billing purposes.*

BellSouth may make periodic test calls to the your system to verify the accuracy of your tracking system. You will provide, upon request, necessary records to allow BellSouth to audit the number of times a listing has been used.

BellSouth may perform an audit on your records at any time and will conduct a formal audit of your records annually to verify the accuracy of the usage you report. The results of the audit are presumed to be correct. If appropriate, BellSouth will adjust your bill if the results of the audit deem necessary.

All rights, title and interest in and to Directory Assistance Database Service, including all intellectual property rights pertaining thereto, will remain with BellSouth. BellSouth licenses the use of Directory Assistance Database Service to the customer. Title to Directory Assistance Database Service shall remain solely with BellSouth whether or not it is in the possession of the customer.

CERTIFICATE OF SERVICE

I, Tonya Y. VanField, hereby certify that a copy of the foregoing Exhibits to Excell Agent Service's Comments to the Petitions for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service in CC Docket No. 97-172 was served this 30th day of November, 1999, via hand delivery, and first-class mail upon the following:

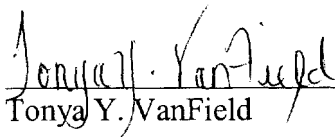
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Atlanta, Georgia 30307-3610



Tonya Y. VanField

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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NOV 29 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
)

Bell Atlantic South, BellSouth
and SBC Petitions for
National Directory Assistance)
)
_____)

CC Docket No. 97-172

COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

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November 29, 1999

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Bell Atlantic South, BellSouth
and SBC Petitions for
National Directory Assistance

)
)
) CC Docket No. 97-172
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COMMENTS OF EXCELL AGENT SERVICES, L.L.C.

Excell Agent Services, L.L.C. ("Excell Agent Services" or "Excell"), by its attorneys, hereby files its comments in response to the petitions of Bell Atlantic South ("BA"), BellSouth Corporation ("BellSouth"), and SBC Communications, Inc. ("SBC Communications") seeking forbearance from section 272 requirements in connection with each company's provision of national directory assistance services. ("BA, BellSouth, and the SBC Companies" will also be referred to collectively as the "RBOCs" throughout these comments).

¹ The BA petition was submitted by Bell Atlantic Delaware, Inc.; Bell Atlantic Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc. The other Bell Atlantic telephone companies filed a forbearance petition on October 22, 1999 and Excell filed comments to the petition on November 12, 1999. See Exhibit A.

² Ameritech, Pacific Bell ("PB"), Nevada Bell ("NB") and Southwestern Bell Telephone Company ("SWBT").

³ See Petition of Bell Atlantic for Further Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service, CC Docket No. 97-172 (filed Nov. 5, 1999) ("BA Petition"); see also Bell South Petition for Forbearance for Non-local Directory Assistance Service, CC Docket No. 97-172 (filed Oct. 8, 1999) ("BellSouth Petition"); see also Petition of SBC Communications, Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Non-local Directory Assistance Services, CC Docket No. 97-172 (filed Nov. 2, 1999) ("SBC Petition") (referred herein collectively as the "Petitions").

I. INTRODUCTION AND SUMMARY

In their respective Petitions, the RBOCs seek the same relief granted to US WEST when US WEST sought forbearance from section 272 of the Communications Act of 1934, as amended (the “Act”), in connection with the provision of US WEST’s national directory assistance (“DA”) services.⁴ In line with the US WEST NDA Order, an RBOC’s provision of non-local DA service, albeit an interLATA service, may be permitted under section 271(g)(4), the exception for incidental interLATA services. In these comments, Excell submits that the FCC should determine that it will forbear from applying the separate affiliate requirements found under section 272 only if it determines that the Petitions create a record strong enough to meet the statutory criteria for forbearance and meet the non-discrimination standards established in the US WEST NDA Order. Excell submits that the current record does not support such a finding.

If the FCC permits the RBOCs to opt into the US WEST NDA Order, the FCC will forbear from applying the separate subsidiary requirements of section 272 to the RBOCs, but presumably will retain the nondiscrimination requirements it imposed in US WEST NDA Order pursuant to section 272(c)(1).⁵ Under these nondiscrimination provisions, an RBOC must: (1) make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide DA service at the same rates, terms, and conditions it imputes to itself; (2) make changes to its cost allocation manual to reflect this change accordingly; (3) make the

⁴ See Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Memorandum Opinion and Order, CC Docket Nos. 97-172 and 92-105 (rel. Sept. 27, 1999) (“US WEST NDA Order”).

⁵ Id.

directory listing information of the customers of independent and competitive local exchange carriers (“LECs”) operating in its region available to unaffiliated entities if the RBOC uses the same information in its provision of non-local DA service; and (4) update and maintain the directory listing information it provides to unaffiliated entities in the same manner it updates and maintains the directory listing information it uses in the provision of non-local DA service.⁶ Both BA and BellSouth assert that they will comply with all of these non-discrimination requirements.⁷ Conversely, the SBC Companies do not propose or suggest in their comments that they will comply with the non-discrimination requirements. In fact, it appears that the SBC Companies intend to abide by their own inaccurate interpretation of the non-discrimination requirement of the US WEST NDA Order which requires US WEST to make its in-region directory assistance information available to unaffiliated entities.⁸

Even if the non-discrimination provisions of the US WEST NDA Order are applied to the RBOCs, Excell urges the FCC to recognize the fact that the RBOCs can manipulate these requirements to charge anti-competitive rates for DA data to unaffiliated entities. The non-discrimination requirements in their current form have not curbed US WEST’s practice of assessing unjust and unreasonable rates for directory assistance data to unaffiliated entities. Nor have the requirements been responded to by the RBOCs as a warning that they too must charge just and reasonable rates for wholesale DA data. As the FCC explained in the US WEST NDA Order, “because of [the RBOCs’] dominance in the local market, [they have] the ability to charge

⁶ Id., para. 37.

⁷ See BA Petition, at 4; see also BellSouth Petition, at 8-9.

⁸ See SBC Petition, at 4.

rates for directory listing information that may make it difficult for competing providers of non-local directory assistance service to succeed in the market and at the same time, give [the RBOCs] a competitive advantage.”⁹ It was for this reason that the FCC retained certain non-discrimination requirements from section 272 in the US WEST NDA Order. However, the requirements as currently written have not deterred the RBOCs from treating unaffiliated providers of DA in a discriminatory fashion. Accordingly, should the FCC determine in the DA Access Proceeding that LECs must provide DA data at cost-based rates,¹⁰ it should apply that safeguard to the RBOCs in this proceeding (on a retroactive basis if necessary). In addition, if the FCC develops any other pro-competitive safeguards in the DA Access Proceeding, it should similarly apply those safeguards to any RBOCs which may obtain forbearance relief.

Additionally, the FCC should determine, as it did in a recent order addressing a complaint by MCI Telecommunications Corporation (MCI) against US WEST and Ameritech,¹¹ that the RBOCs were or will be in violation of section 271 of the Act the entire time they provided or provide the nationwide component of their DA service using facilities owned by other entities. The FCC should also determine, as it did in the same MCI Order, that the RBOCs have been in violation of section 272(a)(2)(B)(i), the separate affiliate requirement, since they began offering

⁹ US WEST NDA Order, para 53.

¹⁰ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Provision of Directory Listing Information Under the Communications Act of 1934, As Amended, Third Report and Order; Second Order on Reconsideration of the Second Report and Order; Notice of Proposed Rulemaking, 16 CR 3019 (1999) (“DA Access Proceeding”).

¹¹ MCI Telecommunications Corp. v. US WEST Communications, Inc., et al, Memorandum Opinion and Order, File Nos. E-97-40 and E-97-19, DA 99-2479, para. 17 (rel. Nov. 8, 1999) (“MCI Order”).

their non-local directory assistance services in the LATAs in which they provide such service.¹²

In the MCI Order, the FCC determined that Ameritech, one of the petitioners in the instant proceeding, “will continue to be in violation of [the separate affiliate requirement] until the date upon which it either begins providing [non-local directory assistance service] through a separate affiliate or the Commission grants it forbearance from the section 272 separate affiliate requirement.”¹³

Finally, the FCC should determine that the 3 year sunset deadline set in section 271(f)(1) should have no bearing on the non-discrimination requirements set forth in the US WEST NDA Order. If the Commission does set a sunset date for the non-discrimination requirements established in the US WEST NDA Order, the Commission should set that sunset at a minimum of 7 years from the date any RBOC may be granted forbearance relief.

II. THE PETITIONS DO NOT SATISFY THE FORBEARANCE REQUIREMENTS OF SECTION 160 OF THE COMMUNICATIONS ACT

In the US WEST NDA Order, the FCC determined that it may forbear from the application of section 272 to the incidental interLATA services described in section 271(g). The FCC is authorized to forbear when it finds that enforcement of a statutory provision “is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and

¹² Id. para.19.

¹³ Id.

reasonable and are not unjustly or unreasonably discriminatory” and “is not necessary for the protection of consumers.”¹⁴

In the US WEST NDA Order, the FCC determined that these standards for forbearance from the application of section 272 were satisfied as long as the FCC retained the non-discrimination requirements found in section 272(c). These non-discrimination requirements for provision of non-local DA were established on June 9, 1999. Even though the full text of the US WEST NDA Order was not released until September 27, 1999, the News Release of June 9, 1999 provided enough notice to the RBOCs that they ought to alter their non-local DA format in order to meet the standards of forbearance.¹⁵ The News Release put each RBOC on notice that it: (1) must make available to unaffiliated entities all of the telephone numbers it uses in providing region wide DA service at the same rates, terms, and conditions it imputes to itself; and (2) must own the information storage facilities used in the provision of its national DA services.¹⁶ Now, nearly 5 months after this notice was released, the RBOCs are seeking forbearance without demonstrating that they have conformed to the non-discrimination requirements adopted in the US WEST NDA Order. Excell submits that forbearance is not appropriate until the RBOCs are in compliance with these conditions.

¹⁴ See 47 U.S.C. §§ 160(a)(1), (a)(2).

¹⁵ FCC Grants US WEST Significant Regulatory Relief to Provide Nonlocal Directory Assistance Service, News Release (June 9, 1999) (“News Release”).

¹⁶ Id. at 2.

Both of these RBOCs have known that the only way they can provide non-local DA services is by owning the information storage facilities used in the provision of the DA services. BA states in its petition that it owns some of the information storage facilities but is not the sole owner of all of the facilities used to provide the nationwide component of its DA services and that it is still working out this situation. Similarly, BellSouth simply asserts, without explanation, that it will "ensure that all of the out-of-region listing information (as well as all of the in-region listing information) BellSouth uses to provide non-local directory assistance is stored in and retrieved from storage facilities owned by BellSouth."¹⁷ In the E911 Forbearance Order, the FCC stated that "a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met."¹⁸ The FCC may find that the record provided by BA and BellSouth fail to demonstrate that these companies have met the forbearance standard because (1) they have not demonstrated that they own all of the information storage facilities used in their provision of nationwide DA services, and (2) they do not appear to be complying with the non-discrimination criteria established by the FCC in the US WEST NDA Order.

The SBC Companies do not even state that they agree to comply with the non-discrimination requirements of the US WEST NDA Order. SWBT and PB state that they will purchase their own information storage facilities, an implicit admission that they do not yet own

¹⁷ Bell South Petition, at 6.

¹⁸ See Comments of AT&T Corp in CC Docket No. 97-172; DA 99-2345 (filed November 12, 1999) (citing Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, 13 FCC Rcd 2627 (1998)).

such facilities.¹⁹ Ameritech is the only SBC Company that fully complies with the requirement to use its own information storage facilities in the provision of nationwide DA, but Excell rejects SBC's claim that "no further action on [Ameritech's] part was or is required in order for it to be granted forbearance from Section 272 for NDA."²⁰ Ameritech must prove that it is in compliance with the non-discrimination criteria set forth in the US WEST NDA Order just as the other RBOCs must do. Not only is such compliance not evident from the SBC Petition, the SBC Petition leaves one under the impression that the SBC Companies intend to act anti-competitively towards unaffiliated entities that seek access to their DA databases. Although one of the non-discrimination requirements of the US WEST NDA Order requires RBOCs to provide access to DA data to all unaffiliated entities, the SBC Companies interpret "unaffiliated entities" to mean local exchange and toll carriers only.²¹

Excell submits that the RBOCs, because they have not demonstrated in their respective Petitions that they are in compliance with the non-discrimination criteria set forth in the US WEST NDA Order, have not satisfied the forbearance criteria in section 160 of the Communications Act. The FCC can and should decide to refrain from granting forbearance to the RBOCs until they can demonstrate that they are in compliance with the non-discrimination requirements the FCC held over from section 272 as a condition for forbearance.

¹⁹ NB does not provide national DA service at this time, making a request for forbearance premature. The FCC should sever NB from its consideration of the rest of the SBC Petition.

²⁰ SBC Petition, at 3.

²¹ Id. at 4.

III. THE FCC SHOULD RECOGNIZE THE RBOCs' ABILITY TO MANIPULATE THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED IN THE US WEST NDA ORDER AND APPLY ANY PRO-COMPETITIVE SAFEGUARDS IT DEVELOPS IN THE DA ACCESS PROCEEDING TO THE RBOCs IN THE INSTANT PROCEEDING ON A RETROACTIVE BASIS

In its forbearance proceeding, US WEST sought relief from section 272 which would have required it to provide non-local DA services through a separate affiliate. The FCC determined that it would refrain from applying section 272 in its entirety, but would retain the non-discrimination requirements under section 272(c)(1) in connection with US WEST's provision of non-local DA services. Section 272(c)(1) provides that a BOC "may not discriminate between [its section 272 affiliate] and any other entity in the provision or procurement of goods, services, facilities and information"²² To guard against such unlawful discrimination, the FCC determined that US WEST must "make available to unaffiliated entities all of the in-region directory listing information it uses to provide region wide directory assistance service at the same rates, terms and conditions it imputes to itself."²³

The FCC made this determination based upon its finding in the record that "the rates US WEST charges unaffiliated entities for obtaining directory listing information have the potential to adversely affect competition in the non-local directory assistance market."²⁴ Excell believes that the FCC was concerned with the record before it which demonstrated the exorbitant rates the RBOCs charge for access to directory assistance data and prescribed a remedy it thought would

²² 47 U.S.C. § 272(c)(1).

²³ US WEST NDA Order, para. 37.

²⁴ US WEST NDA Order, para. 35.

bring those rates to a competitively reasonable level. However, instead of respecting the non-discrimination requirement imposed on US WEST in the US WEST NDA Order as an admonition against RBOC anti-competitive practices, the RBOCs have acted as if they will treat the non-discrimination requirements as a loophole to enable them to continue to charge unreasonable rates to unaffiliated entities. In effect, under the non-discrimination requirement, the RBOCs are able to charge any rate, no matter how unreasonable, to unaffiliated entities as long as they “impute” those same rates to themselves.

US WEST was required to “record any charges it imputes for its non-local directory services in its revenue accounts” and to “account for any imputed charges by debiting its non-regulated operating revenue accounts and crediting its regulated revenue accounts by the amounts of the imputed charges.”²⁵ However, this is a mere procedural requirement that does not detrimentally affect an RBOC’s ability to compete. On the other hand, the unaffiliated entities that must pay these excessive rates for DA data to the RBOCs do not have the luxury of debiting their “non-regulated operating revenue accounts” and crediting their “regulated revenue accounts.” Excell submits that the RBOCs technically may be able to comply with the FCC’s imputation requirements in every respect, but that the FCC’s original purpose in retaining the non-discrimination provisions under section 272 in the US WEST NDA Order may nevertheless not be fulfilled: to “ensure that the competitive advantages US WEST enjoys with respect to the

²⁵ Id. para. 37, n.95.

provision of directory assistance service throughout its region will not undermine competition in the market for non-local directory assistance.”²⁶

In the DA Access Proceeding, several parties suggested that the FCC impose specific regulatory safeguards on the LECs in order to promote competition in the market for directory assistance services. Independent DA providers and the carriers that purchase wholesale DA from these providers filed comments in the DA Access Proceeding demonstrating to the FCC that LECs should be required to permit non-discriminatory access to their DA data at rates based on costs. Thus, Excell submits that the FCC should condition any relief it may grant to the RBOCs in this proceeding on the applicability of any pro-competitive safeguards it may adopt in the DA Access Proceeding. Because the FCC may resolve the RBOC forbearance proceedings prior to resolving the DA Access Proceeding, it should determine that any pro-competitive safeguards developed in the DA Access Proceeding will be retroactively applied to the RBOCs (including US WEST) that may be subject to the decisions in these forbearance proceedings. In the alternative, the FCC may wish to withhold action on any further RBOC forbearance requests, including those at issue here, pending resolution of the DA Access Proceeding.

Indeed, the FCC is authorized pursuant to section 271(h) to apply potential pro-competitive findings in the DA Access Proceeding to the RBOCs that seek or have obtained forbearance. Section 271(h) states that the FCC must “ensure that the provision of services authorized [as incidental interLATA services under section 271(g)] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.”²⁷ Currently, the RBOCs can manipulate the non-

²⁶ See US WEST NDA Order, para. 36.

²⁷ 47 U.S.C. § 271(h).

discrimination requirements in such a way that allows them to continue to charge excessive and unreasonable rates to their competitors for access to directory assistance listings. This adversely affects the market for DA services and is ultimately injurious to telephone exchange service ratepayers.

IV. THE FCC SHOULD CLARIFY THAT THE NON-DISCRIMINATION REQUIREMENTS PROHIBIT AN RBOC FROM DISCRIMINATING BETWEEN "CLASSES" OF UNAFFILIATED ENTITIES

A. BA AND BELL SOUTH CURRENTLY DISCRIMINATE BETWEEN CLASSES OF UNAFFILIATED ENTITIES

BA's current offer to Excell would require the purchase of a minimum of 60,000,000 listings with a minimum fee of \$1,800,000 for the first year of its contract and a minimum of 30,000,000 listings for each year after the first year of the contract. Conversely, Excell has learned that BA does not routinely require competing providers of telephone exchange service and telephone toll service to purchase a minimum number of listings.

In order to obtain BellSouth's Directory Assistance Database Service ("DADS"), Excell must, among other things, agree to: a minimum usage period of 12 months, a monthly administrative fee, a usage fee, a potential cancellation fee and a potential termination fee.²⁸ Excell submits that the DADS product is not updated as frequently as the product BellSouth uses for its own provision of DA. The resulting product is less accurate than the listings used by BellSouth's operators, and the lower accuracy rate increases Excell's internal costs because it elects to elevate more calls to advanced service agents to minimize the effect of inaccuracies in BellSouth's DADS product. Conversely, Excell has learned that competing providers of

²⁸ See Exhibit B.

directory assistance services have negotiated and received a superior DA product from BellSouth.²⁹

BA and BellSouth, in their provision of access to DA data to unaffiliated entities under the requirements established in the US WEST NDA Order, should not be permitted to discriminate in any manner between classes of unaffiliated entities. In their respective petitions, BA and BellSouth claim that they will comply with the non-discrimination requirements set forth in the US WEST NDA Order. Thus, the FCC should reaffirm those broad non-discrimination requirements in this proceeding and require that the RBOC's conform their current practices to the non-discrimination requirements before any grant of forbearance becomes effective.

B. SBC CURRENTLY DISCRIMINATES BETWEEN CLASSES OF UNAFFILIATED ENTITIES IN ITS PROVISION OF ACCESS TO ITS DA DATABASES AND INTENDS TO DO SO EVEN AFTER IT RECEIVES A GRANT OF FORBEARANCE

In the SBC Petition, the SBC Companies do not agree to comply with the non-discrimination requirements established in the US WEST NDA Order. Indeed, the SBC Companies interpret the provision in the US WEST NDA Order requiring RBOCs to make their in-region directory listing information (including the listings of the customers of independent and competitive LECs) available to unaffiliated entities in a nondiscriminatory manner to apply only to local exchange and toll carriers only, and not to third party DA providers.³⁰ In the US WEST NDA Order, the FCC explicitly requires that all of the in-region directory listing information an

²⁹ Also, it is Excell's understanding that if BellSouth is not using the DADS product but instead has direct access to its own database, it is not currently imputing the rates, terms and conditions for access to DA data it imposes on others to itself.

³⁰ SBC Petition, at 4.

RBOC uses to provide region wide DA services be made available to all unaffiliated entities at the same rates, terms and conditions it imputes to itself.³¹ The definition of “unaffiliated entities” that the SBC Companies propose in their forbearance petition can not be found anywhere in the US WEST NDA Order, the Communications Act or the FCC’s rules. The SBC Companies attempt to re-write the non-discrimination requirements of the US WEST Order to apply to local exchange and toll carriers only and not third-party providers by arguing that the FCC has determined that third party DA providers are not included under the definition of section 251(b)(3). However, the definition of “provider” under section 251(b)(3) is inapplicable to the instant proceeding where the non-discrimination requirements at issue were established under section 272. The FCC should summarily dismiss the SBC Companies’ interpretation of the definition of an “unaffiliated entity” and clarify that the SBC Companies and any other RBOCs that receive forbearance treatment must make their in-region directory listing information available to all unaffiliated entities on a non-discriminatory basis regardless of whether or not any particular unaffiliated entity is a carrier.

Furthermore, Excell has learned that at least one of SBC’s subsidiaries, SWBT, is providing access to its DA databases at what appear to be cost-based rates (\$.0011 per initial listing, \$.0014 per electronic update and \$.0019 per magnetic tape update) to telecommunications providers, but at a much higher rate to other (non-carrier) DA providers (\$.0585 per listing). SWBT and the other SBC Companies, in their provision of DA data to unaffiliated entities under the requirements established in the US WEST NDA Order, should not be permitted to discriminate in any manner between classes of unaffiliated entities. The FCC

³¹ See US WEST NDA Order, para. 37 (emphasis added).

should reaffirm its non-discrimination requirements in the US WEST NDA Order and require that SBC conform its current practices to these requirements before any grant of forbearance becomes effective.

Finally, the SBC Companies claim a prohibition by the California Public Utility Commission from releasing directory listing information without prior authorization from the applicable underlying carrier.³² Excell submits that the FCC should specifically preempt any such California rule and any other state jurisdiction rule or order that places restrictions on the RBOCs ability to transfer any in-region DA listing information pursuant to the FCC's requirements.

V. THE FCC SHOULD FIND THAT THE RBOCs' PROVISION OF NATIONAL DA SERVICE HAS BEEN IN VIOLATION OF OR IS CURRENTLY IN VIOLATION OF SECTIONS 271 AND 272

In the US WEST NDA Order, the FCC construed section 271(g)(4) to permit an RBOC to offer non-local directory assistance only when it uses its own information storage facilities.³³ Several RBOCs concede in their Petitions that they were providing or are still providing non-local DA using storage facilities owned by other entities and, hence, have violated or are violating section 271. The FCC recently determined that "US WEST had been and will be violating section 271 of the Act by providing the nationwide component of its directory assistance services [while it does not own the information storage facility accessed by US WEST to provide these services] from the date it began offering non-local directory assistance service until the date upon which US WEST brings the nationwide component of its service into full

³² SBC Petition, at 4.

³³ See US WEST NDA Order, para. 23; see also MCI Order, para 17.

compliance with the requirements set forth in the [US WEST NDA Order].”³⁴ The FCC ordered US WEST to “cease providing nationwide directory assistance until [its] service is reconfigured to comply with section 271(g)(4).”³⁵ The FCC should similarly order the RBOCs that do not own the information storage facilities used in the provision of their non-local DA services to cease providing nationwide directory assistance until the date that their services are properly reconfigured.

The FCC should also determine that all of the RBOCs that have been providing non-local DA assistance without first receiving a grant of forbearance from the section 272 separate affiliate requirements are providing these services in violation of section 272. In the MCI Order, the FCC determined that Ameritech, one of the petitioners in the instant proceeding, “will continue to be in violation of [the separate affiliate requirement] until the date upon which it either begins providing [non-local directory assistance service] through a separate affiliate or the Commission grants it forbearance from the section 272 separate affiliate requirement.”³⁶ The FCC should similarly determine that all of the RBOCs that filed petitions in this proceeding have been and will continue to be in violation of the separate affiliate requirement of section 272 until they cease providing non-compliant national DA or until the FCC grants forbearance to each of them.

³⁴ MCI Order, para. 17.

³⁵ See US WEST NDA Order, para. 63. Excell believes that US WEST did not cease offering national DA and has continued to violate section 271 and the US WEST NDA Order.

³⁶ MCI Order, para. 19.

VI. THE SUNSET PROVISIONS IN SECTION 272 DO NOT APPLY TO THE NON-DISCRIMINATION REQUIREMENTS ESTABLISHED IN THIS PROCEEDING, OR, IN THE ALTERNATIVE, THE SUNSET PROVISIONS SHOULD BE EXTENDED TO 7 YEARS OR BEYOND

Excell is concerned that the provisions of section 272(f)(1) may be interpreted to create a sunset for the non-discrimination requirements the FCC applied to US WEST and will presumably apply to other RBOCs in their provision of non-local DA services pursuant to section 272(c)(1). Section 272(f)(1) states that the “provisions of [section 272] . . . shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.”³⁷ Excell submits that the FCC has determined that non-local DA service provided by a Bell operating company is an incidental interLATA service permitted under the section 271(g)(4) exception, and since the statutory sunset applies to services authorized pursuant to section 271(d), and not to incidental interLATA services authorized pursuant to section 271(g)(4), section 272(f)(1) does not apply.

In the alternative, section 272(f)(1) enables the FCC to extend the 3 year period by rule or order, and Excell submits that if the FCC does apply the sunset in section 272(f)(1) to the non-discrimination requirements it established in the US WEST NDA Order, it should change that sunset date to at least 7 years from the date any RBOC may be granted forbearance relief.

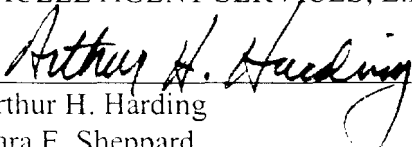
³⁷ 47 U.S.C. § 272(f)(1) (emphasis added).

VII. CONCLUSION

For the reasons explained herein, the FCC should grant the RBOCs' Petitions only once it determines that the record contains more than unsupported allegations and that the RBOCs have demonstrated that their non-local DA services are being provided in compliance with the non-discrimination criteria set forth in the US WEST NDA Order. If the FCC grants such forbearance, it should also find that any pro-competitive safeguards established in the DA Access Proceeding, including any provision that would require the RBOCs to provide access to DA data at cost-based rates, must be applied to any RBOCs that obtain forbearance in this proceeding. Finally, the FCC should find that the RBOCs have been and will be violating sections 271 and 272 until they reconfigure the manner in which their non-local DA services are provided and until they receive grants of forbearance from the application of section 272. The findings Excell has urged throughout these comments are necessary to prevent the RBOCs from assessing unjust and unreasonable rates for DA data and to promote competition in the market for directory assistance services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tonya Y. VanField, hereby certify that a copy of the foregoing Comments to the Petitions for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Service in CC Docket No. 97-172 was served this 29th day of November, 1999, via hand delivery, and first-class mail upon the following:

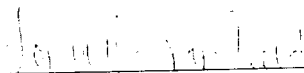
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